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No. 72-578

Supreme Court, U. S.
FILED
DEC 7 1972
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

IN RE:

BRUCE W. BUBLICK, a Witness Before The July, 1972 Grand Jury,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

AMICUS CURIAE BRIEF OF THE CHICAGO COUNCIL OF LAWYERS

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The Chicago Council of Lawyers, a voluntary association of approximately 1200 lawyers, hereby respectfully files the following *amicus curiae* brief in support of the Petition for Writ of Certiorari. Counsel for all parties have consented to this submission.

Some of the members of the Chicago Council of Lawyers, as well as others throughout the State, have incorporated or intend to incorporate under the provisions of the Illinois "Professional Service Corporation Act" of 1969 (32 Ill. Rev. Stat. § 415-1 *et seq.*). The Seventh Circuit Court of Appeals, with-

out any briefing and argument, has issued a highly unusual summary decision holding that those who incorporate under this statute lose their privilege against self-incrimination. Only this Court can authoritatively dispel the cloud thereby cast over the professional status of these persons. The central issue raised — whether incorporation under that or like statutes destroys an individual's privilege against self-incrimination — is of immediate concern to the members of our association, and we believe we can be of assistance to the Court in resolving it.

ARGUMENT

The novelty of this case resides in the unprecedented nature of the entity formed under the Illinois "Professional Service Corporation Act" of 1969. This act follows the pattern of similar statutes in other states in carving out a special and narrow method by which persons engaged in certain kinds of professional service, such as lawyers, doctors, accountants, etc., may "incorporate" and thereby take advantage of provisions of the federal tax code respecting pension and profit sharing plans without incurring otherwise onerous tax consequences. See Worthy, "IRS Chief Counsel Outlines What Lies Ahead for Professional Corporations", *Journal of Taxation* 88, 89 (February 1970).

But this act of incorporating does not significantly alter the professional or legal relations involved. Principally:

1. legal liabilities for professional malpractice and the conduct of professional life remain unchanged (32 Ill. Rev. Stat. § 415-8; Illinois Supreme Court Rule 721(d)); and

2. the relationship to the licensing and regulatory authority, the Supreme Court of Illinois, remains unchanged (32 Ill. Rev. Stat. §§ 415-7, -8, -15, -16, Illinois Supreme Court Rule 721(b)).

While certain other legal advantages and disadvantages may be implicated by this "incorporation" (see Ray, "Factors that go into Decision of Whether to Operate as a Professional Corporation", *The Journal of Taxation* 130 (March 1971)), it is nonetheless true that, as the IRS Chief Counsel has said:

> "The most important reason why professionals have incorporated is probably to take advantage of Code provisions relating to qualified pension and profit sharing plans for the benefit of employees." *Worthy, supra*, at 89.

Petitioner incorporated himself under the Illinois Act, becoming the sole incorporator, shareholder, board of directors and officer of his "corporation". He remains personally liable for his professional performance and his professional obligations are unchanged. Looking at Bruce W. Bublick as individual practitioner on the day before his incorporation, and "Bruce W. Bublick, Ltd." as professional service corporation on the day afterwards, it is difficult to see how, in terms of the relevant policies of the Fifth Amendment privilege against self-incrimination,* a significant step has been made which should deny him rights which existed the day before.

Nonetheless, following the Seventh Circuit's decision, he may have fallen into a constitutional trap. For while the Fifth Amendment's privilege against self-incrimination has long protected lawyers and other individuals from compulsory disclosure by government in the conduct of their personal business and professional affairs (*Boyd* v. *United States*, 116 U.S. 616, 630 (1886); *Spevack* v. *Klein*, 385 U.S. 511 (1967) (lawyer may not be disbarred for invoking privilege)), public "corporations" have traditionally been denied the right to invoke the privilege. *Hale* v. *Henkle*, 201 U.S. 43, 70 (1906).

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* "Thus we may view the historical development of the privilege as one which groped for the proper scope of governmental power over the citizen. As a 'noble principle often transcends its origins,' the privilege has come rightfully to be recognized in part as an individual's substantive right, a 'right to a private enclave where he may lead a private life. That right is the hallmark of our democracy.' *United States* v. *Grunewald*, 233 F.2d 556, 579, 581-582 (Frank, J., dissenting), rev'd, 353 U.S. 391 (1957). We have recently noted that the privilege against self-incrimination—the essential mainstay of our adversary system—is founded on a complex of values, *Murphy* v. *Waterfront Comm'n*, 378 U.S. 52, 55-57, n. 5 (1964); *Tehan* v. *Shott*, 382 U.S. 406, 414-415, n. 12 (1966). All these policies point

The reason for this is expediency. As this Court said in *Hale*

> "A privilege so extensive might be used to put a stop to the examination of every witness who was called upon to testify before the grand jury . . ." (201 U.S. at 70.)

When in 1913 a case came before this Court involving the efforts by a sole shareholder of an otherwise public business corporation to invoke the privilege as to corporate documents, without "extended discussion" this Court applied the public "corporation" rule to deny him the protection he sought. *Grant and Burlingame* v. *United States*, 227 U.S. 74, 79 (1913). *Grant* resolved the conflict between considerations of efficiency reflected in *Hale* and constitutional policies of "personal security" reflected in the Fifth Amendment's privilege (*Malloy* v. *Hogan*, 378 U.S. 1, 8 (1964)) in favor of efficiency.

It would seem that the novel and limited type of corporation involved here is sufficiently distinguishable from both the public and the usual closed or single shareholder corporation to require a different result than *Grant*. Contrary to the impli-

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to one overriding thought: the constitutional foundation underlying the privilege is the respect a government—state or federal—must accord to the dignity and integrity of its citizens. To maintain a 'fair state-individual balance,' to require the government 'to shoulder the entire load,' 8 Wigmore, Evidence 317 (McNaughton rev. 1961), to respect the inviolability of the human personality, our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth. *Chambers* v. *Florida*, 309 U.S. 227, 235-238 (1940). In sum, the privilege is fulfilled only when the person is guaranteed the right 'to remain silent unless he chooses to speak in the unfettered exercise of his own will.' *Malloy* v. *Hogan*, 378 U.S. 1, 8 (1964)." *Miranda* v. *Arizona*, 384 U.S. 436, 460 (1966).

cations of the Seventh Circuit's summary disposition, there was nothing inevitable in their result. In *United States* v. *White*, 322 U.S. 694, 701 (1944) (unincorporated labor union held too "impersonal" to permit application of the privilege as to its officers), this Court rejected the sort of "mechanical comparison" of entities employed by the Seventh Circuit:

> "The test, rather, is whether one can fairly say under all the circumstances that a particular type of organization has a character so impersonal in the scope of its membership and activities that it cannot be said to embody or represent the purely private or personal interests of its constituents, but rather to embody their common or group interests only."

The simple act of incorporating under the Illinois professional service corporation act hardly creates group interests where none previously existed.

Given the narrow purpose and effect of this Illinois Act, and the continuing decidedly personal nature of the service afforded, this Court should consider whether the concepts of expediency and efficiency advanced to deny *public* corporations the protection of the privilege in *Hale* v. *Henkel* should control here over the important privacy policies embodied in the Fifth Amendment. Recently this Court faced a similar conflict in *Bloom* v. *Illinois*, 391 U.S. 194 (1968), in which it was decided that punishments for criminal contempt in excess of that afforded "petty offenses" cannot be imposed without a jury trial. As here, the argument against affording the constitutional right invoked burden, expense and inefficiency. This Court said that:

> "When a serious contempt is at issue, considerations of efficiency must give way to the more fundamental interest of ensuring the even-handed exercise of judicial

> power . . . Perhaps to some extent we sacrifice efficiency, expedition, and economy, but the choice in favor of jury trial has been made and retained, in the Constitution." *Bloom* v. *Illinois*, 391 U.S. at 209.

In a host of other decisions in recent years, this Court has similarly rejected arguments based on the "efficiency" of the criminal process on favor of procedural guarantees reflecting important constitutional values. See *e.g.*, *Mayer* v. *City of Chicago*, 404 U.S. 189, 196-197 (1971) (free transcripts to indigents in petty cases); *Miranda* v. *Arizona*, 384 U.S. 436 (1966) (warnings and counsel before confessions); *Chimel* v. *California*, 395 U.S. 752 (1969) (searches); *Gideon* v. *Wainwright*, 372 U.S. 335 (1963) (counsel at trial); *United States* v. *Wade*, 388 U.S. 218 (1967); *Gilbert* v. *California*, 388 U.S. 263 (1967) (counsel at police lineups); *Duncan* v. *Louisiana*, 391 U.S. 145 (1968) (jury trials for serious crimes). Certainly the privilege against self-incrimination "—the essential mainstay of our adversary system—" (*Miranda* v. *Arizona*, 384 U.S. at 460), deserves its high place among these values and closer consideration than the short shrift accorded it here by the Seventh Circuit Court of Appeals.

THIS CASE IS NOT MOOT

The fact that Petitioner turned over the documents in question to the grand jury under protest rather than go to jail does not deprive this Court of jurisdiction over what is obviously a continuing live and vital controversy. Petitioner has been adjudged in contempt and suffers this continuing blot on his professional record. The status of similar professional corporations throughout the country continues in doubt. Nothing can be gained by deferring consideration of this obviously inevitable issue.

CONCLUSION

For the foregoing reasons, the Chicago Council of Lawyers respectfully urges this Court to grant the Petition for Writ of Certiorari.

Respectfully submitted,

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